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Supreme Court, U.S.
FILED
AUG 2 4 2007
OFFICE OF THE CLERK

35pp (30) (9)

Nos. 06-1195, 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, *et al.*,
Respondents.

KHALED A.F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae the Association of the Bar of the City of New York (the "ABCNY") is an independent professional association of more than 22,000 lawyers, judges and legal scholars. Founded in 1870, the ABCNY is devoted to advancing the role of the legal system in our society, including protecting against Government infringement of individual rights guaranteed by the United States Constitution.

The ABCNY adheres to the fundamental proposition that the rule of law requires that all those in jeopardy of their freedom have meaningful access to counsel and courts. Assuring such access is a core concern of the ABCNY, and the ABCNY has asserted the critical importance of counsel in a wide range of civil, criminal, and immigration proceedings. The issues of this case implicate the lawyer's central role, not only of providing counsel to the individual whose liberty is at stake, but of assisting the tribunal by making the presentation concerning the relevant facts and law that only a trained advocate can provide. The ABCNY has an interest in ensuring that the issues in this case are resolved to give proper weight to values of individual liberty, fairness, and equal justice under law.

Amicus is particularly concerned with, and informed about, the position of the detainees at the Guantanamo Bay Naval Base. Several ABCNY members, acting in accord with the highest ideals of the profession, provide pro bono

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *Amicus* or counsel, has made a monetary contribution to the preparation or submission of this brief. The Parties have consented to the filing of this brief; such consent, in the form of letters and/or blanket consent, has been filed with the Clerk of this Court. Sup. Ct. R. 37.3(a).

representation to the detainees, and the ABCNY has written a number of analyses, in reports and *amicus* briefs, concerning the legal requirements applicable to the detainees.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 28, 2004, this Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that aliens being detained at the United States Naval Base at Guantanamo Bay, Cuba ("detainees") were entitled to invoke the jurisdiction of federal courts to petition for a writ of habeas corpus to challenge the legality of their detention. The following year, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("DTA"), and amended the habeas statute to provide that "no court, justice, or judge" may exercise jurisdiction over "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba[.]" DTA § 1005(e)(1). Six months later, on June 29, 2006, this Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006), and held that Section 1005(e)(1) of the DTA did not apply to habeas claims pending at the time of its enactment. Once more reacting quickly, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366,

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[2] *See, e.g.*, THE IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS REACT TO GLOBAL WAR ON TERRORISM (James R. Silkenat & Mark R. Shulman, eds., 2007); Brief of *Amicus Curiae* the Association of the Bar of the City of New York, *et al.* in Support of the Respondent, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027); Brief of the Association of the Bar of the City of New York, *et al.* as *Amici Curiae* in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Brief *Amici Curiae* of Bar Associations, *et al.* in Support of Petitioners' Motions to Set Procedures and for Entry of Protective Order and in Opposition to Respondent's Motion for Protective Order, *Bismullah v. Gates*, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (Nos. 06-1197 and 06-1397).

120 Stat. 2600 (2006) ("MCA"), and again amended the habeas statute to provide that no court, justice, or judge shall have jurisdiction over an application for a writ of habeas corpus filed by a detainee determined to be, or awaiting determination as, an "enemy combatant," and that the amendment was intended to apply to "all cases, without exception, pending on or after the date of the enactment . . . ." MCA §§ 7(a) & (b).

The Suspension Clause of the United States Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. If the privilege applies to a person in custody, Congress may withhold access to the Great Writ from that person only if it provides an adequate alternative.[3] No such adequate alternative exists for the detainees of Guantanamo Bay.[4] Under current procedures, a

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[3] *See INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (noting that "a serious Suspension Clause issue would be presented if . . . [the] statutes have withdrawn [habeas] power from federal judges and provided no adequate substitute for its exercise"); *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also Boumediene v. Bush*, 476 F.3d 981, 1004 (D.C. Cir. 2007) (recognizing that Congress, "[i]f it so chooses . . . may replace the privilege of habeas corpus with a commensurate procedure" and that this Court has, on three occasions, "found a replacement to habeas corpus to be adequate") (Rogers, J., dissenting).

[4] In the decision currently under review, *Boumediene v. Bush*, the court held that the detainees did not have a constitutional right to habeas relief, and, therefore, did not reach the question whether the review process provided for by the DTA is an adequate alternative to a habeas proceeding. 476 F.3d at 990–92. While *Amicus* believes that the detainees have the right to habeas relief, that issue is dealt with elsewhere by the Parties and other *amici*. The question of particular relevance to *Amicus*, and the issue *Amicus* addresses here, is the more limited question whether, in denying the detainees access to the writ of habeas corpus, Congress has provided an adequate alternative in the form of Combatant Status Review Tribunal proceedings combined with review by the D.C. Circuit. Because these proceedings deny a detainee any

three-person military tribunal reviews a detainee's enemy combatant status and, accordingly, whether the detainee may be held in custody, at a proceeding in which the detainee is denied any access to or representation by counsel. The United States Constitution prohibits the Government from depriving a person of his life, liberty, or property without due process of law. U.S. Const. amend. V. Due process requires that the litigant be provided notice and a meaningful opportunity to be heard, which, when a litigant's personal liberty is at stake, at minimum, requires that the litigant be permitted the assistance of counsel. The detainees of Guantanamo Bay are denied this essential component of due process.

Habeas relief routinely is granted when a petitioner was denied the effective assistance of counsel, and thereby denied his due process rights, at the underlying proceeding that extinguished his liberty. And in the habeas hearing itself, the petitioner never is refused the right to bring in counsel; indeed, courts often appoint counsel for a habeas petitioner to ensure adequate representation at the habeas hearing. Pursuant to the Combatant Status Review Tribunal ("CSRT") procedures and the DTA, however, a detainee's liberty is determined in a proceeding where the assistance of *any* counsel, including any counsel that the detainee has retained on his own behalf, is *affirmatively prohibited.* For this fundamental reason alone, the DTA cannot be regarded an adequate substitute for habeas.

The availability of counsel later, once the CSRT determination comes to the D.C. Circuit for review, does not render this statutory process an adequate alternative to habeas for at least two reasons: the availability of appellate review does not negate the denial of due process in the first

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counsel, retained or appointed—a deprivation of constitutional significance that would result in immediate relief by any habeas court—the answer is "no."

instance where liberty is extinguished, and the absence of counsel at the CSRT hearing stage virtually guarantees that the record on appeal will be inadequate for an Article III court to provide meaningful review.

ARGUMENT

I. The CSRT Procedure Explicitly Withholds From Detainees The Benefit Of The Assistance of Counsel.

In direct response to this Court's holding in *Rasul v. Bush* that detainees are entitled to invoke the jurisdiction of the federal courts to petition for a writ of habeas corpus to challenge the legality of their detention, 542 U.S. at 484, then-Deputy Secretary of Defense Paul Wolfowitz issued a memorandum to the Secretary of the Navy establishing CSRTs for the review of detainees' status as "enemy combatants."[5] The CSRT decides whether the detainee will remain classified as an "enemy combatant" and subject to imprisonment for an indefinite period. The Establishing Order defines "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Establishing Order, *supra* note 5, at 1. Three weeks after the Deputy Secretary of Defense issued the Establishing Order, the Secretary of

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[5] Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040707review.pdf [hereinafter "Establishing Order"].

the Navy issued a memorandum setting out the manner in which the CSRT procedures were to be implemented.[6]

The procedures outlined in both the Establishing Order and Implementation Memo for the review of status determinations raise serious due process concerns.[7] Detainees are not brought before a neutral decision-maker, but before a three-member panel of commissioned Armed Forces officers who have been informed that the detainee already has been determined to be an enemy combatant after "multiple levels of review by officers of the Department of Defense." Establishing Order, *supra* note 5, at 1. Detainees are not permitted to see any of the classified evidence upon which the determination of their enemy combatant status was based.[8] Implementation Memo, *supra* note 6, enc. (1) at 2–

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[6] Memorandum from Secretary of the Navy Gordon England for Distribution, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040730comb.pdf [hereinafter "Implementation Memo"].

[7] *See Hamdi v. Rumsfield*, 542 U.S. 507, 532–33, 539 (2004) (plurality) (determining that a United States citizen captured on the battlefield while engaged in combat against the United States there and detained, first at Guantanamo and then in the United States, is entitled to due process which, at minimum, requires notice of the basis for detention, a fair opportunity to be heard before a neutral decision-maker, and access to counsel). *Amicus* recognizes that the plurality in *Hamdi* limited its resolution to the precise circumstances presented there. When read with *Rasul*, however, *Hamdi* may fairly be interpreted to impose the same due process requirements for alien detainees at Guantanamo as for United States citizens detained as "enemy combatants."

[8] The "inherent lack of fairness" in CSRT proceedings was described in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005):

> The CSRT reviewed classified information when considering whether each detainee presently

3. Even though the CSRT procedures purportedly afford the detainees the right to call witnesses if "reasonably available," Department of Defense data reveal that detainees' requests to call witnesses routinely are denied, even when the witnesses also are detained at Guantanamo.[9] Establishing Order, *supra* note 5, at 2. The CSRT is not bound by any rules of evidence: the panel is free to rely on hearsay and is permitted to base its determination on testimony elicited by torture or other coercive means.[10] *Id.* at 3. The Government's evidence is granted a rebuttable presumption that it is "genuine and accurate," and the Government need only prove by a preponderance of the evidence that "each detainee meets the criteria to be designated as an enemy combatant." Implementation Memo, *supra* note 6, enc. (1) at 6. To grant the Government a "rebuttable presumption," when the detainee is in no position to rebut it, is in fact to grant the Government an irrebuttable presumption.

> before this Court should be considered an "enemy combatant" . . . . No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

[9] *See* MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS?, at 27 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf [hereinafter "NO-HEARING HEARINGS"].

[10] *Amici* Retired Federal Judges discuss the grave implications of a system in which an Article III court becomes complicit in a CSRT status determination (and the resulting imprisonment) in proceedings that lack the basic requirements of due process.

What little possibility that justice could be done by the CSRT process is eliminated by the deprivation of counsel: the detainees are not permitted the advice or assistance of lawyers at any point during the process. Rather, they are "assisted" by a "Personal Representative," and the Implementation Memo explicitly prohibits this Personal Representative from being a lawyer.[11] Although the Personal Representative is able to review all Government Information,[12] he is forbidden from revealing classified information to the detainee. Implementation Memo, *supra*

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[11] Implementation Memo, *supra* note 6, enc. (1) at 4 ("The detainee shall not be represented by legal counsel but will be aided by a Personal Representative . . . ."); *id.* enc. (3) at 1 ("The Personal Representative shall not be a judge advocate."). In contrast, it is "preferabl[e]" that the "Recorder," who "has a duty to present to the CSRT such evidence . . . as may be sufficient to support the detainee's classification as an enemy combatant," be a judge advocate. *Id.* enc. (2) at 1. The CSRT procedures do call for the appointment of a judge advocate officer as a "Legal Advisor to the Tribunal process." *Id.* enc. (1) at 2. The Legal Advisor is for the benefit of the Tribunal, and not the detainee. *See id.* ("The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available . . . to each Tribunal as an advisor on legal, evidentiary, procedural or other matters.").

[12] "Government Information" is defined as:

> [S]uch reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings[.]

Implementation Memo, *supra* note 6, enc. (1) at 3.

note 6, enc. (3) at 2. Communications between the detainee and the Personal Representative are not confidential and may be revealed to the CSRT by the Personal Representative. *Id.* enc. (3) at 3. As Judge Green stated in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472, (vacated and dismissed for lack of jurisdiction by the court below), there is both "inherent risk" and "little corresponding benefit" to a detainee's choice to rely upon a Personal Representative.

During the hearing, the Personal Representative is under no obligation to act as an advocate in the detainee's favor. On the contrary, he is obliged to inform the detainee: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing." Implementation Memo, *supra* note 6, enc. (3) at 3. According to the Implementation Memo, the Personal Representative is appointed "to ensure [the detainee] understand[s] [the] process" and his function is to "assist" the detainee at the hearing, in gathering materials for the hearing, and in preparing an oral or written presentation for the Tribunal. *Id.* enc. (3) at 2–3. The Personal Representative may choose to "comment" upon classified information to the CSRT, outside the presence of the detainee, if he believes it would "aid" the Tribunal's deliberations. *Id.* enc. (3) at 2.[13] The only party with any obligation to alert the Tribunal to evidence that may be in the detainee's favor is the Recorder—the Government's advocate. *Id.* enc. (1) at 7.

The detainee's choice is truly no choice at all: take someone who is untrained and cannot put his best interests first, or take no one.

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[13] 12% of the time, the Personal Representative did not say a word. 36% of the time, he made non-substantive comments. 52% of the time, the Personal Representative made substantive comments; in a number of those cases, however, he did so to advocate on behalf of the Government. *See* NO-HEARING HEARINGS, *supra* note 9, at 16.

II. Access To Counsel When Liberty Is At Stake Is Central To Our System of Justice.

Effective assistance of counsel is fundamental to the rule of law when liberty is at stake. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("[The assistance of counsel] is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty."); *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) ("[T]he right of one accused of crime to the benefit of counsel . . . . ha[s] been found to be implicit in the concept of ordered liberty. . . . ") (internal citation and footnote omitted). Recognition that assistance of counsel is essential to the protection of liberty is premised on the reality that, without counsel's assistance, accused persons cannot meaningfully defend themselves and tribunals lack the wherewithal to reach just decisions.

A. When Liberty Is At Stake, Counsel Cannot Be Denied.

The importance of assistance by trained counsel is never greater than when the Government seeks to deprive a person of his liberty. This guiding principle has been recognized and articulated since the earliest days of our nation's Founding: the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" and federal law provided for the

appointment of counsel in federal capital proceedings. Federal Crime Act of 1790, ch. 9, 1 Stat. 112, 118. The right to the provision of counsel in all federal criminal proceedings which threaten the defendant's liberty, including non-capital proceedings, was confirmed in *Johnson v. Zerbst*, when this Court held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." 304 U.S. at 463.

In *Powell v. Alabama*, 287 U.S. 45 (1932), this Court went beyond reliance on the Sixth Amendment and identified the interplay between the assistance of counsel and the essential element of due process, the right to be heard. "It never has been doubted," Justice Sutherland wrote, "that notice and hearing . . . constitute basic elements of the constitutional requirement of due process of law." *Id.* at 68. He continued: "Historically and in practice, in our own country at least, [a hearing] has always included the right to the aid of counsel . . . . The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68–69. Accordingly, this Court held in *Powell* that, under the Fourteenth Amendment, in a state capital case, "it is the duty of the court . . . to assign counsel . . . as a necessary requisite of due process of law[.]" *Id.* at 71. Central to the holding in *Powell* was the fact "above all," that defendants "stood in deadly peril of their lives[.]" *Id.*

In a series of opinions issued thirty years later, this Court established, through the Sixth Amendment and principles of incorporation, that defendants are entitled to the appointment of counsel in all criminal proceedings, both federal and state, in which their liberty is in jeopardy. *See Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether

classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."); *Gideon*, 372 U.S. at 344 (holding it is an "obvious truth" that any person "haled into court . . . cannot be assured a fair trial unless counsel is provided for him").

The right to the provision of counsel has not been limited to the criminal context. This Court has stated that the "pre-eminent generalization" of its precedents on the right to appointed counsel is that the right exists in cases "where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981). Thus, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel[.]" *Id.*; *see also Vitek v. Jones*, 445 U.S. 480, 492, 496–97 (1980) (plurality) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness); *In re Gault*, 387 U.S. 1, 41 (1967) (because a juvenile delinquency proceeding, though civil, may result "in commitment to an institution in which the juvenile's freedom is curtailed," due process mandated the appointment of counsel); *cf. Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

While the right to appointed counsel in cases where liberty is at stake is firmly entrenched in this nation's jurisprudence, the right to call on the assistance of retained counsel in such a situation is all the more indisputable. *Indeed, at no time has this Court, or any other, ever held that a litigant may be precluded from utilizing the assistance of*

counsel he has retained on his own behalf when his liberty is threatened.[14]

In *Powell*, Justice Sutherland wrote: "If in any case, civil or criminal, a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and . . . due process in the constitutional sense." 287 U.S. at 69. *See Chandler v. Fretag*, 348 U.S. 3, 9 (1954) ("Petitioner did not ask [to be furnished] . . . counsel; rather, he asked for . . . [time to] obtain his own. The distinction is well established in this Court's decisions. Regardless of whether petitioner would have been entitled to the appointment of counsel, *his right to be heard through his own counsel was unqualified.*") (internal citations omitted) (emphasis supplied); *see also Powell*, 287 U.S. at 68 ("[A hearing] has always included the right to the aid of counsel *when desired and provided by the party asserting the right.*") (emphasis supplied).

The litigant's unqualified right to rely upon retained counsel has been acknowledged outside the criminal context. Most recently, and most relevant here, in *Hamdi*, 542 U.S. at 539, a plurality of this Court determined that a United States citizen captured on the battlefield while engaged in combat against the United States there and detained, first at Guantanamo and then in the United States, "unquestionably has the right to access to counsel" during his habeas proceeding. *See also id.* at 553 ("[N]or, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel") (Souter, J., concurring in part and dissenting in part); *cf. Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)

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[14] *Cf. United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2562–64 (2006) (holding that erroneous exclusion of retained counsel, even when competent counsel is provided, violates a defendant's Sixth Amendment right to the assistance of counsel of choice and that such violation is per se reversible error).

("[T]he recipient must be allowed to retain an attorney if he so desires.") (termination of welfare benefits).

The principle that assistance of counsel is necessary when liberty is at stake rests, in part, on the fact that most laypersons lack the expertise required to represent themselves effectively. In *Powell*, this Court recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." 267 U.S. at 69. Because the layman "lacks both the skill and knowledge adequately to prepare his defense," this Court determined that due process required the defendant have the "guiding hand of counsel at every step in the proceedings against him." *Id.* The layman's inability to defend himself adequately is exacerbated where the litigant is in a vulnerable position because of limited resources, education or language skills, or otherwise has "a greater need for assistance in exercising [his] rights." *Vitek*, 445 U.S. at 496.

This Court has observed also that the unrepresented are particularly vulnerable when faced with an adversary equipped with the familiarity with the legal system that they lack. *See, e.g., United States v. Cronic*, 466 U.S. 648, 654 (1984) ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.") (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)); *Bhd. of R.R. Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries[.]"); *Johnson*, 304 U.S. at 462–63 ("[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.").

B. The Assistance of Counsel Furthers Society's Interest In Assuring Justice.

The right to counsel is necessary, not only to protect an accused's liberty interests, but also to further the interest of the courts and society in ensuring justice. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice."); *Cronic*, 466 U.S. at 655 ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.") (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). Indeed, courts, judges, and the judicial system as a whole cannot function without the aid of effective attorneys. *See, e.g.*, Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 175 (1974) ("The interdependence of bench and bar is the linchpin of our legal system.").

Because the adversarial presentation from competing counsel is essential to reaching just results, the absence of representation for one side necessarily places that objective in peril. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (noting that restrictions on access to counsel and undue limitations on the effectiveness of counsel are both a danger to individual rights and a "severe impairment of the judicial function"); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) ("If . . . the adversary process is not permitted to function properly, there is an increased chance of error, and

with that, the possibility of an incorrect result.") (internal citation omitted); *see also* Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998) ("[T]he task of determining the correct legal outcome is rendered almost impossible without effective counsel.")

III. The CSRT Procedure And Review By The D.C. Circuit Cannot Substitute Adequately For Habeas Relief.

A. Due Process Requires That Counsel Assist Detainees Before The CSRT.

Though it lacks virtually all of the procedural safeguards associated with a fair fact-finding process, the CSRT proceeding effectively is the detainee's "trial": subject only to limited review by the D.C. Circuit, it is the detainee's sole opportunity to contest his designation as an enemy combatant and thus his continued, potentially lifelong, imprisonment by United States authorities. According to the Establishing Order, the Government's advocate supplies the Tribunal with all the documentary evidence supporting the Government's determination that the detainee is an enemy combatant, and the detainee is provided the opportunity to present evidence as to why he should not be classified as an enemy combatant, to question witnesses, and to speak on his own behalf. Establishing Order, *supra* note 5, at 2–3. The Tribunal determines, by majority vote applying a preponderance of the evidence standard, whether the detainee was properly classified. *Id.* at 3. The determination of the detainee's status may result in the indefinite loss of his liberty. Like a criminal trial or civil proceeding in which the litigant's liberty is at stake, the CSRT purports to be both a

fact-finding proceeding and a definitive adjudication of the detainee's status.

Because the CSRT proceeding can result in the detainee's indefinite confinement, due process requires that the detainee be permitted the assistance of counsel in connection with the proceedings.[15] As discussed above, this Court, beginning in *Powell*, has held steadfastly that the fundamentals of due process—notice, the opportunity to be heard, and the right to counsel—are required when life or liberty is at stake. *See* 287 U.S. at 68–69; *see also Vitek*, 445 U.S. at 492, 496–97 (indigent prisoner facing transfer hearing from main prison facility to mental health hospital must be provided with due process); *In re Gault*, 387 U.S. at 41 (juvenile delinquency hearing which may result in commitment must accord with principles of due process).

Powell is particularly apt. It is difficult to imagine a situation that exemplifies the factors that influenced this Court's decision there more saliently than the present one. In *Powell*, it was the defendants' "ignorance and illiteracy . . . their youth, the circumstances of public hostility, the imprisonment and the close surveillance . . . by the military forces, the fact that their friends and families were all in other states and communication with them [was] necessarily difficult, and above all that they stood in deadly peril of their lives" which persuaded this Court to hold they had a due process right to the assistance of counsel. 287 U.S. at 71. Here, similarly, the detainees of Guantanamo

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[15] That the detainees held at Guantanamo have rights under the Due Process Clause and are entitled to fundamental procedural fairness before being subjected to potentially lifelong incarceration follows ineluctably from this Court's decisions in *Rasul* and *Hamdi*. The error of the court below's contrary conclusion is fully canvassed in other briefs submitted to the Court. Moreover, as the Parties and various *amici* also demonstrate, habeas petitioners at common law were entitled to the unfettered assistance of counsel in investigation and advocacy—an entitlement that the Suspension Clause protects regardless of whether or not the detainees have Fifth Amendment rights.

have been imprisoned for years without charges; they are held under harsh, often isolating conditions that in many cases have had damaging effects on their mental and physical condition; they are unfamiliar with our language, laws, and customs; they are deprived of support or communications with family and friends and closely guarded at all times; they have no independent ability to communicate with potential witnesses or obtain access to any other evidence that might help their cause; and they are faced with the prospect of indefinite detention, possibly for life. As Judge Kollar-Kotelly observed in *Al Odah v. United States*:

> [I]t is simply impossible to expect [the detainees] to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. [They] face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system.

346 F. Supp. 2d 1, 8 (D.D.C. 2004). Absent counsel, the detainees have virtually no hope of adequately representing themselves or advocating on their own behalf.

Finally, unlike the detainee who has only his "Personal Representative," in most cases the Government will be represented by a trained lawyer. *See* Implementation Memo, *supra* note 6, enc. (1) at 2 (stating that the Personal Representative "shall not be a judge advocate," but that it is "preferabl[e]" the Recorder be one). Although Department of Defense data demonstrate that the Government rarely calls witnesses or produces evidence during the CSRT proceedings, instead relying on the presumption of reliability

granted to classified evidence,[16] the fact remains that, by design, the CSRT procedure forces detainees into the precise position of imbalance that has influenced this Court's determination that the absence of counsel at hearings in which a litigant's liberty is at stake raises due process concerns. *See, e.g., Cronic*, 466 U.S. at 654; *Johnson*, 304 U.S. at 462–63.

We do not suggest that the absence of counsel is the sole due process inadequacy of the CSRT process, or that providing counsel to the detainees would alone cure the constitutional deficiencies of the process. As discussed in the briefs of the Parties and several other *amici*, the CSRT has a number of structural limitations—including the lack of access to classified information, the presumptive reliability of that information, the admission of hearsay evidence and evidence elicited by torture, and the limited or nonexistent ability to confront the Government's witnesses—which singly and in combination raise many troubling due process concerns. We do maintain, however, that when the deck is stacked so solidly against the detainee, the assistance of counsel may be all that stands between an innocent prisoner and a lifetime in jail.

The CSRT procedure explicitly forbids detainees the assistance of counsel, yet presumes to determine their liberty. By so doing, the CSRT fails to provide the essential component of due process that this Court requires when a person's liberty is at stake.

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[16] NO-HEARING HEARINGS, *supra* note 9, at 5.

B. The Great Writ Provides Relief When Liberty Is Adjudicated At Trial Without The Assistance Of Counsel While The CSRT And The DTA Do Not.

The complete absence of the assistance of counsel at the trial stage, where the right of liberty is first determined, is an error sufficient to mandate immediate habeas relief. *Chandler*, 348 U.S. at 10 ("By denying petitioner any opportunity whatever to obtain counsel . . . the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment. It follows that petitioner is being held by respondent under an invalid sentence. The . . . denial of habeas corpus relief[] is accordingly reversed."); *cf. Johnson*, 304 U.S. at 468 (holding that if the Sixth Amendment requirement that counsel be appointed for an indigent defendant "is not complied with, the court no longer has jurisdiction . . . . [t]he judgment . . . is void, and one imprisoned thereunder may obtain release by habeas corpus").

This is so because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.[17] "The

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[17] To provide effective assistance defense counsel must, among other obligations, consult with his or her client, investigate the facts, mount a competent defense, and raise objections to potentially prejudicial evidence. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (reviewing precedents establishing counsel's duty to "conduct a thorough investigation of the defendant's background") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (finding ineffective assistance of counsel requiring habeas relief when lawyer "prepared no defense strategy . . . . filed no pretrial motions, sought no defense witnesses, failed to properly interview . . . accused witnesses, . . . failed to interview the state's witnesses" and "did not visit the scene of the crime"). *See generally United States v. DeCoster*, 487 F.2d 1197, 1203–04 (D.C. Cir. 1973)

presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 659. Such unfairness renders the "adversary process itself presumptively unreliable." *Id.* The guarantee of a fair trial is so central to the proper functioning of the judicial system and our nation's ideals of due process, that the defendant is entitled to immediate relief, even when represented by counsel, if that representation was constitutionally deficient. *See id.* at 654 n.11 ("In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied.") (quoting *United States v. DeCoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

When presented with a petition for habeas relief from a detention determination reached by a tribunal or other authority where counsel is barred from aiding the prisoner, a habeas court would have no choice but to provide immediate relief to the detainee, no matter what other incidents of due process might have been granted. The review the DTA provides does not mandate the same result. The D.C. Circuit's review is severely limited in scope: the court has jurisdiction only to review whether the CSRT proceedings conformed to the standards and procedures specified by the Secretary of Defense and whether the standards and procedures employed by the CSRT are consistent with the Constitution and laws of the United States "to the extent the

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(holding that a defendant is entitled to "reasonably competent assistance" and setting forth specific duties a lawyer owes to his or her client).

Constitution and laws of the United States are applicable."[18] DTA § 1005(e)(2)(C)(i) & (ii). The DTA does not permit the detainee to conduct discovery at the appellate level or to submit new evidence to the D.C. Circuit. There is no evidentiary hearing, no investigation, no presentation of witnesses or exculpatory evidence; the appellate court does not engage in habeas-like fact finding; its review is not *de novo*. In short, the relief afforded by the DTA is the furthest cry from the relief possible under the Great Writ.

C. Assistance Of Counsel On Appeal Does Not Cure The Deficiencies At The CSRT.

Section 1005(e)(2)(A) of the DTA provides that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." The fact that detainees may be represented by counsel on appeal to the D.C. Circuit does not cure the constitutional deficiency of the CSRT proceeding. A later appeal does not change the reality that the detainee was denied due process during the initial proceeding in which his liberty was adjudicated. Furthermore, the D.C. Circuit's review cannot be meaningful, as it is limited to the CSRT record, created at a proceeding in which the detainee was prohibited access to counsel, and the Government Information, to which the

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[18] Considering the determination of the court below that Guantanamo detainees have no constitutional rights, *see Boumediene*, 476 F.3d at 992–93, it is unclear what protection, if any, this latter provision provides. As demonstrated by *Amicus*, if the detainees have rights under the Constitution, then the entire CSRT procedure is invalid because of the deprivation of counsel.

detainee does not have access and therefore has not been subject to adversarial testing.[19]

1. The Detainee Is Entitled To Have Counsel Advocate On His Behalf Before The Initial Decisionmaker.

Because the detainee cannot be represented or assisted by counsel while preparing for or during the CSRT hearing, the hearing result presented to the D.C. Circuit is "presumptively unreliable." *See Cronic*, 466 U.S. at 659. Procedural deficiencies which deprive the litigant of a fair trial and due process of law cannot be cured by appellate review. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In *Ward*, the respondent argued that any "unfairness at the trial level" caused by an non-impartial adjudicator could be "corrected on appeal and trial de novo[.]" *Id.* at 61. This Court held, however, that "the State's trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." *Id.* "Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* at 61–62. Here, as in *Ward*, the detainees are entitled to due process "in the first instance." And due process requires that the detainees be permitted the assistance of counsel at the proceeding in which their liberty interest is determined, which is, the CSRT proceeding. The detainees are not permitted such assistance; it is explicitly withheld from them. Review by the D.C. Circuit cannot ameliorate that wrong.

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[19] In *Bismullah v. Gates*, 2007 WL 2067938, at *7 (D.C. Cir. July 20, 2007), the court held that, for purposes of appeal, the "record" consists of the Government Information "plus any evidence submitted by the detainee or his Personal Representative."

2. A Record Assembled Without The Participation Of Counsel Provides An Inherently Unreliable Record For Review.

Even if it were possible for appellate review to diminish the procedural unfairness of an initial proceeding, appellate review of the CSRT determination cannot reliably reach just results, much less substitute for the procedures available in a habeas court. The CSRT determination of the detainee's status is made based on information to which, in large part, the detainee has no access, and at a proceeding in which the detainee is denied counsel. The result is a record for appellate review that lacks the degree of constitutional integrity necessary for that review to be meaningful.

The participation of counsel in an adversarial proceeding is essential to the development of the facts and law that create a complete and adequate record. *See McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52, 78 (D.C. Cir. 2001) ("Critical to the development of a proper record is a well-functioning adversarial process in which lawyers serve both as zealous representatives of their clients and as officers of the court[.]") (Tatel, J., concurring in part and dissenting in part); *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 1994) ("In our system of government, courts base decisions . . . on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record."). It was precisely because the detainees were unable to "investigate the circumstances surrounding their capture and detention" on their own that Judge Kollar-Kotelly held in *Al Odah v. United States* that the detainees had the right to the assistance of counsel "in order to properly litigate the habeas petitions presently before the Court and in the interest of justice." 346 F. Supp. 2d at 8 ("To say that Petitioners' ability to investigate the

circumstances surrounding their capture and detention is 'seriously impaired' is an understatement. The circumstances of their confinement render their ability to investigate nonexistent.").

A complete and accurate record is vital; without it, appellate courts are unable to serve the reviewing function that is committed to them by law. *See, e.g., United States v. Lewis*, 433 F.2d 1146, 1152 (D.C. Cir. 1970) ("The rationale for these requirements [such as the requirement that a party object during trial in order to preserve it on appeal] includes importantly the need for a record, developed by adversary processes, on which appellate consideration and resolution can safely proceed.") (footnote omitted); *Lee v. Habib*, 424 F.2d 891, 897 (D.C. Cir. 1970) ("There can never be effective appellate review if the reviewing court is not able to obtain a clear picture of the precise nature of the alleged errors in the court below."); *cf. Smith v. Robbins*, 528 U.S. 259, 295 (2000) (Souter, J., dissenting) ("A judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution.").

The D.C. Circuit's review is confined to the Government Information, much of which the detainee is prohibited from seeing, and the record of a proceeding based upon that Information, in which the Information is granted a presumption of accuracy. At no point is the detainee afforded a realistic opportunity to challenge the evidence against him or fully to develop the evidence that might exonerate him. The result is appellate review of a record that has never been subject to true adversarial testing—which is to say, no review at all.

The assistance of counsel at the appellate level is too little, too late: confined to an incomplete, inadequate, and potentially inaccurate record, the appellate court is incapable of conducting a meaningful review of the determination below. Rather than exercising the right to a meaningful review, the detainee exercises "only the right to a

meaningless ritual . . . ." *Douglas v. California*, 372 U.S. 353, 358 (1963).

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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